

Provisions Relating to Illegal Import, Confiscation, Penalty and Allied Provisions

Question 1

Write short note on Power to Search Persons under section 100 & 101 of Customs Act 1962.

Answer

Search under section 100 is conducted by the proper officer of the customs, whereas search under section 101 is conducted by the officer of customs empowered by the Commissioner of Customs.

A person can be searched under section 100 if the proper officer has reason to believe that any goods liable to confiscation or documents relating thereto are secreted in his possession. However, a person can be searched under section 101 only for **certain specified goods** which are liable to confiscation or documents relating thereto. The specified goods are gold, diamonds, manufactures of gold or diamonds, watches, and any other notified goods.

Section 100 applies to only the persons specified therein e.g. any person in a customs area. However, for search under section 101, there is **no restriction regarding place of such person**.

Question 2

Mr. Vasu, the assessee, was summoned under section 108 of the Customs Act, 1962, to give his statement in an inquiry. He filed the application for anticipatory bail in the District and Sessions Court which was disposed on the ground of being premature. However, he later moved to the High Court, which granted him anticipatory bail with a direction to the authorities that he should not be arrested without giving a seven day's prior notice to him. The Revenue contended that the order passed by the High Court was illegal and erroneous. Explain, with the help of a decided case law, if any, whether the stand taken by the Revenue is sustainable in law?

Answer

The stand taken by the Revenue is valid. A similar issue has been dealt by the Supreme Court in the case of **Union of India v. Padam Narain Aggarwal 2008 (231) ELT 397**, wherein the Apex Court has observed that the power to arrest by a Custom Officer under section 104 of the Customs Act, 1962 is statutory in character and cannot be interfered with.

Supreme Court pronounced that the direction to issue 10 days prior notice before arrest even in case of a non-bailable offence could not be said to be legal or in consonance with law owing to **two reasons**. **Firstly**, the **order** passed by the High Court was a **blanket** one and granted protection to respondents in respect of any non-bailable offence. **Secondly**, it **illegally obstructed, interfered and curtailed the authority** of Custom Officers from exercising statutory power of arresting a person said to have committed a non-bailable offence by imposing a condition of giving 10 days prior notice, a condition not warranted by law. Hence, the order of the High Court was set aside.

Therefore, in the given case, it can be concluded that the stand taken by the revenue is sustainable in law.

Question 3

Briefly explain the provisions of section 28BA of the Customs Act, 1962 regarding provisional attachment of property pending adjudication.

Answer

Section 28BA of the Customs Act, 1962 provides for **provisional attachment of property** pending adjudication as under:

- (1) During the pendency of any proceeding under section 28 or 28B, the proper officer may provisionally attach any property belonging to the person to whom notice is served under section 28(1) or 28(B)(2), as the case may be, in accordance with the rules made under section 142 in this respect.
- (2) When proper officer is of the **opinion** that the attachment is necessary for the **purpose of protecting revenue interest**, only then he can do so but before that the permission in writing from the Commissioner of Customs must be obtained.
- (3) Such an attachment can be done for a **period of six months** from the date of order of Commissioner of Customs permitting for such an attachment.
- (4) The **period may be extended** by Chief Commissioner of Customs for a further period or periods as he may deem fit. The reasons of such an extension shall be recorded in writing. The total period of extension in any case shall not exceed two years.
- (5) If an application for settlement of a case is made to the Settlement Commission, period from the date of making the application to the date of an order passed by the Commission under section 127C(1) shall be excluded from the extended period mentioned in point (4) above.

Question 4

Write a short note on provisional release of goods, documents and things seized pending adjudication.

12.3 Indirect Tax Laws

Answer

According to provisions of amended Section 110A[w.e.f. 08.04.2011] of Customs Act, 1962 any goods, documents or things that are seized under section 110 may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as adjudicating authority may require.

Question 5

Write short note on Fine and Penalty under Customs Act.

Answer

Section 125 of the Customs Act provides for the power of the customs officer to give an option to the owner of the goods or, where such owner is not known, the person from whose possession or custody the offending goods have been seized to pay '**fine**' in lieu of confiscation of such offending goods. The provisions in this regard are as follows:

- (i) The customs officer **may** give an option to pay a fine in lieu of confiscation (Redemption Fine) in case of **prohibited goods**.
- (ii) In case of **other goods**, the customs officer **shall** give an option of payment of redemption fine.
- (iii) The amount of such fine cannot exceed the market price of the confiscated goods less the duty paid thereon.
- (iv) Where any fine in lieu of confiscation of goods is imposed, the owner of goods or the person from whom the goods were seized, shall in addition be liable to pay duty and charges payable in respect of such goods.

The word **penalty means punishment under the law, i.e. such punishment as is provided in penal laws**. It also means the sum payable as a punishment for a default. Penalty provisions under the Customs Act are for improper importation/exportation of goods, short-levy or non-levy of duty in certain cases, non accounting for goods and contravention etc. not expressly mentioned.

Question 6

Briefly write a note on whether an exporter who has been held guilty of exporting 'prohibited goods' is entitled to an option to pay fine in lieu of confiscation under section 125 of the Customs Act, 1962.

Answer

As per **section 125** of the Customs Act, 1962, whenever confiscation is ordered, the adjudicating officer **may** provide an option to the owner of the goods **to pay redemption fine in lieu of confiscation** if the importation or exportation of goods is prohibited. However, if importation or exportation of goods is not prohibited, the option to pay redemption fine **shall** be given to the owner of goods.

Therefore, an exporter guilty of exporting prohibited goods is **not entitled as such** to an option to pay fine in lieu of confiscation under section 125 of the Customs Act, 1962. It is at **the discretion of the adjudicating officer** to give or not to give such an option to the exporter guilty of exporting prohibited goods. However, the owner of the goods importing or exporting non-prohibited goods shall be entitled to such an option.

Question 7

Enumerate the penalties in respect of improper exportation of goods under section 114 of the Customs Act.

Answer

Section 114 of the Customs Act, 1962 provides that any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable:

- (i) in the case of goods in respect of which any **prohibition** is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under the Act, whichever is the greater.
- (ii) in the case of **dutiable goods, other than prohibited goods**, to a penalty not exceeding the duty sought to be evaded or five thousand rupees, whichever is the greater;
- (iii) in the case of **any other goods**, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.

Question 8

Write a detailed note on penalty for short-levy or non-levy of duty or non-payment or part-payment of interest by reason of collusion, any willful mis-statement or suppression of facts.

Answer

Section 114A deal with penalty for short-levy or non-levy of duty or non-payment or part-payment of interest by reason of collusion, any willful mis-statement or suppression of facts. The provisions of aforementioned section 114A have been given below in the tabular form for the sake of easy remembrance:

Relevant Section and proviso	Brief Heading	Relevant Provisions
114A	When penalty is to be imposed and quantum of penalty	Where the duty has not been levied or short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful-mis-

12.5 Indirect Tax Laws

		statement or suppression of facts, the person liable to pay the duty/interest as determined u/s 28(8) shall also be liable to penalty equal to the duty or interest so determined
First proviso to section 114A	When the reduced penalty will be levied	Where the concerned person makes payment of duty or interest determined u/s 28(8) and the interest payable thereon u/s 28AA within 30 days from the date of the communication of the order of the proper officer, the amount of penalty liable to be paid under this section shall be 25% of the duty or interest so determined by the proper officer.
Second proviso to Section 114A	Essential condition for availing the benefit of reduced penalty	The benefit of reduced penalty under first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the aforementioned period of 30 days.
Third proviso to section 114A	Effect of increase or decrease in the duty or interest by Commissioner(Appeals), Appellate Tribunal or Court	Where the duty or interest determined to be payable is reduced or increased by the Commissioner(Appeals), the Appellate Tribunal or the Court, then for the purposes of this section the duty or interest as reduced or increased shall be taken into account.
Fourth proviso to Section 114A	Essential condition for claiming the benefit of reduced penalty consequent upon increase in the duty or interest	In a case where the duty or interest determined to be payable is increased by the Commissioner(Appeals), the Appellate Tribunal or the Court, then the benefit of reduced penalty under the first proviso shall be available if the amount of duty or interest so increased, along with the interest payable thereon under section 28AA and 25% of the consequential increase in penalty have also been paid within 30 days of the communication of the order by which such increase in the duty or interest takes effect.
Fifty proviso to Section 114A	No simultaneous penalty under this section and Section 112/Section 114	Where any penalty has been levied under this section, no penalty shall be levied under section 112/ section 114.

Question 9

When the ship on its arrival from Dubai was searched by the Customs Officers, they found 2,000 biscuits of gold kept concealed in the ceiling of one of the unoccupied cabin. The Chief Cook of the ship admitted the concealing of the gold. The Captain of the ship deposed in his statement that he alongwith Chief Engineer and Chief Officer had inspected the vessel for contraband goods and inspection did not reveal anything. No evidence was also found that captain was involved in the smuggling of gold.

Discuss whether the ship is liable to confiscation under the Customs Act.

Answer

Section 115(2) of the Customs Act, 1962 *inter alia* provides that any conveyance used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation. However, if the owner of the conveyance proves that the conveyance was so used without the knowledge and connivance of the owner himself, his agent, and the person in charge of the conveyance, the conveyance shall not be liable to confiscation. As per section 2(31)(a) of the Customs Act, in case of a vessel, the master of the vessel is the person-in-charge.

Since, in the problem there is no evidence that the captain of the ship i.e., the master of the vessel had any knowledge about the smuggling of the gold or he had connived in the smuggling of gold, **the ship shall not be liable to be confiscated.**

In a similar situation, the Supreme Court has set aside the order of confiscation of a truck carrying forest produce in contravention of the provisions of the Forest Act as the authorities failed to establish that the owner of the truck had any knowledge about the truck being so used. [*Forest Conservator v. Sharad Ramachandar Kale 2000 (121) E.L.T. 14 (S.C.)*]

Question 10

State the necessary conditions for effecting seizure under section 123 of the Customs Act

Answer

There are **four ingredients in section 123** of the Customs Act:

- (i) there should be seizure under the provisions of Customs Act;
- (ii) seizure must have been from the possession of the person proceeded against or the one claiming ownership of the goods;
- (iii) seizure must be in respect of goods for which section 123 applies;
- (iv) seizure must be in the reasonable belief that the goods seized are smuggled.

Section 123 applies in case of gold and manufactures thereof, watches and other notified goods. In a case where all these four ingredients are established by the seizing authorities, the burden to prove that the seized goods are not smuggled goods lies on the owner or possessor of the seized goods.

12.7 Indirect Tax Laws

Note: The provisions relating to seizure are dealt in **section 110** of the Customs Act, 1962. Therefore, this question may also be answered in light of the provisions of section 110. The provisions of section 110 dealing with seizure are as follows:

An Officer of Customs can **seize any goods**, if he has **reason to believe** that the same are liable to confiscation, under the Customs Act. However, if the goods are bulky, they can be kept in possession of the owner himself and a notice be served on him that he should not remove or in any way deal with the goods as per proviso to section 110(1) of Customs Act. The proper officer may also seize **any document or things** that may be relevant to any proceedings under the Customs Act. However, the person from whom these documents are seized is entitled to make copies of the same.

The person from whom the goods are seized is **issued a show cause notice**, usually within six months. If the notice is not issued within six months, the seized goods are returned to the person from whom they were seized. However, the Commissioner of Customs, on sufficient cause being shown, can extend the time period for issue of show cause notice, by a further period of six months.

If the seized goods are **perishable or hazardous in nature** or are **prone to depreciate** in value over time or there is constraint in storage space, the Government may notify such goods and the same can be **disposed off** before the conclusion of the proceedings.

Question 11

Briefly discuss, the procedure for confiscation of goods or imposition of penalty under section 124 of the Customs Act, 1962

Answer

Section 124 of the Customs Act, 1962 provides that before confiscating goods or imposing any penalty on any person, a **show cause notice [SCN]** must be issued to the owner of goods giving grounds for confiscation or imposition of penalty and he should be given an opportunity to make representation and being heard. The show cause notice can be issued only with the prior approval of the officer of customs not below the rank of Assistant Commissioner of Customs.

The notice and the representation, at the request of the person concerned, can be oral.

Question 12

When is redemption fine imposed? Whether this fine under Section 125 of the Customs Act, once paid, be claimed as refund, in case the importer decides to abandon the goods?

Answer

Section 125 of the Customs Act empowers a Customs Officer adjudging the confiscation to give an option to the owner of the goods or where such owner is not known, the person from whose possession or custody such goods have been seized to pay a fine as the said officer

thinks fit, in lieu of confiscation of the imported goods. The provisions in this regard are as follows:

- (a) in case of prohibited goods, the proper officer **may** give an option to pay a fine in lieu of confiscation;
- (b) in case of other goods, the proper officer **shall** give an option of payment of fine, in lieu of confiscation;
- (c) the amount of such fine cannot exceed the market price of the goods confiscated less import duty chargeable (in the case of imported goods) thereon;
- (d) the assessee shall also be liable to pay any duty and charges payable in respect of such goods.

The provisions of section 125 give the importer an option to either allow the goods to be confiscated or pay redemption fine in lieu of confiscation. Hence, **the redemption fine becomes liable only in lieu of confiscation.**

However, where the importer has abandoned the goods, the scope for payment of any fine in lieu of confiscation comes to an end. Hence, the redemption fine, if already paid shall be liable to be refunded. The same decision was given by the Madras High Court in the case of ***Purfina Chemicals Pvt. Ltd v CEGAT, Madras (2004) (167) E.L.T. 145 (Mad.)***

Question 13

Write short note on "Power to arrest" with reference to the Customs Act

Answer

Power to arrest : Section 104 of the Customs Act, 1962 empowers a proper officer (who is empowered by general or special order of Commissioner of Customs) to arrest any person in India or within Indian customs waters, if the official has **reason to believe that the person is guilty of an offence** punishable under section 132 or section 133 or section 135 or section 135A or section 136 of the Customs Act..

Such a person should be informed of the grounds of his arrest and taken to the nearest Magistrate immediately. The Customs Officer is vested with the powers of an Officer-in-charge of a police station for the purpose of releasing any person on bail or otherwise. The offences under this Act shall not be cognizable. An arrest can be made **only as per the provisions of section 46 of the Criminal Procedure Code.**

Self-examination questions

Question 1

Discuss briefly the provisions in respect of mandatory penalty for short-levy or non-levy of duty in certain cases.

Question 2

Explain the provisions in respect of confiscation of a conveyance under section 115 of the Customs Act, 1962.

Question 3

M/s. Shree Ram Traders had imported certain goods and got them cleared for home consumption. Later, the Department found that the goods had been imported in contravention of Import Control Act and Import Control Order. Consequently, the goods were confiscated under section 111(d) of the Customs Act and a penalty under section 112 of the Act was levied.

You are required to examine the case and offer your views.

Answers

The facts of the case are similar to the case of *Bussa Overseas & Properties P. Ltd. v C.L. Mahar, Asstt. C.C., Bombay* 2004 (163) E.L.T. 304 (Bom.) wherein the Bombay High Court observed that once goods are cleared for home consumption they cease to be imported goods as defined in section 2(25) of the Customs Act and as per section 111(d) only 'imported' goods could be confiscated. Hence, power to confiscate the goods, after their clearance for home consumption, could be exercised only in cases where the order of clearance is revised and cancelled.

Therefore, in the given case the confiscation of the goods by the Department is illegal.

Section 112 (a) provides that any person who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such act, is liable to a penalty. The High Court held that the power to impose penalty could be exercised not only when the goods are available for confiscation but when such goods are liable to confiscation. The Court held that the expression 'liable to confiscation' clearly indicates that the power to impose penalty can be exercised even if the goods are not available for confiscation. The mere fact that the importers secured such clearance and disposed of the goods and thereafter goods are not available for confiscation cannot divest Customs Authorities of the powers to levy penalty under section 112 of the Act.

Following the judgment of the High Court, penalty levied by the Department in the given case is correct in law.

Question 4

Pranjal had imported certain goods. Due to some technical problems he had to pay the redemption fine. Later on, he decides to abandon the goods. So, he claims the refund of redemption fine being paid by him. Is his claim tenable in law? Discuss.

Answer

The facts of the case are similar to that of *Purfin Chemicals Pvt. Ltd. v. CEGAT Madras* 2004 (167) E.L.T. 145 (Mad.). The High Court, in this case, asserted that provisions of section 125 of the Customs Act give an option to the importer to either allow the goods to be confiscated or pay redemption fine in lieu of confiscation. Therefore, the redemption fine becomes leviable only in lieu of confiscation. The High Court observed that in this case the importer had abandoned the goods and thus, there remained no scope for confiscation of the same. Therefore, it was held by the High Court that the fine should be refunded.

Applying the ratio of this decision in the given case, it can be said that Pranjal can claim the refund of the redemption fine.

Question 5

Two trucks are intercepted by the Customs Department. The officers of the Customs Department conduct search of the vehicle in the presence of witnesses and it is found that one of the trucks has a secret compartment and 175 Kgs. of heroine and 39 Kgs. of opium of foreign origin are concealed in that chamber. During the course of investigation, the statement of 'P', the registered owner of the vehicle, is taken under section 108 of the Customs Act and 15 witnesses are examined. However, 'P' completely denies his culpability in the crime. He contends that though the vehicle is registered in his name but he has sold the truck much before the contraband goods are recovered therefrom.

You are required to examine the situation with the help of case law, if any.

Answer

The facts of the case are similar to the facts of the case of *Balwinder Singh v. Asstt. Commissioner, Customs & Central Excise* 2005 (181) E.L.T. 203 (S.C.). In this case, the Supreme Court stated that the registered owner of the vehicle was convicted solely for the reason that he was the registered owner of the vehicle. There was no evidence to prove that he knowingly allowed any person to use the vehicle for any illegal purpose. There was also no evidence to prove the conspiracy set up by the prosecution. The Apex Court held that though the articles were recovered from the truck, there was no evidence to show that the appellant had any control over the vehicle nor was he in possession of those drugs. Therefore, the registered owner of the vehicle was acquitted of all charges framed against him.

In the given case also, there is no evidence against 'P', the registered owner of the vehicle, and thus he shall not be prosecuted.